In the Supreme Court of the United States.

OCTOBER TERM, 1910.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 319.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

Plaintiff in error was indicted in the United States court at Pauls Valley, Ind. T., on May 28, 1906, for the murder of one Robert W. Voss. (Rec., p. 5 and 6.) On his application the case was transferred to the United States District Court at Paris, Tex. (Rec., p. 7.) On March 4, 1909, he made application that the case be removed from the United States District Court at Paris, Tex., to the District Court of Garvin County, State of Oklahoma, which was disallowed. (Rec., pp. 8 and 9.) Thereupon the case

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was tried, and the jury returned a verdict of guilty, without capital punishment (Rec., p. 11), and plaintiff in error was sentenced to imprisonment for life (Rec., p. 12). A motion for a new trial was entered and overruled (Rec., pp. 14, 17); and, errors being assigned, the case has been removed to this court by writ of error.

The questions presented will be considered in the order in which they appear in the assignment of errors.

I.

The United States District Court for the Eastern District of Texas had jurisdiction to try this case, and it was not error for that court to overrule plaintiff in error's motion to remove the case to the district court of Garvin County, State of Oklahoma.

1. *Statutes material for the determination of the questions presented.*

(*a*) Statutes relating to the offense:

By the fourth section of the act of March 1, 1895, chapter 145 (28 Stat., 693), it was provided that chapter 45 of Mansfield's Digest of the General Laws of Arkansas, entitled "Criminal Law," with certain exceptions mentioned, and certain other sections of said digest not here material, should be extended to and put in force in the Indian Territory; but it was also provided that "in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern as to said offenses."

Sections 1516 to 1531 of Mansfield's Digest relate to the offense of murder, and section 5339, Revised Statutes United States, declares that every person who commits murder, first, within any fort, arsenal, dockyard, magazine, or any other place or district or country under the exclusive jurisdiction of the United States * * * shall suffer death. This section with reference to punishment was modified by section 1 of the act of January 15, 1897, chapter 29 (29 Stat., 487), by providing that the jury may qualify their verdict by adding thereto "without capital punishment." Under the statutes of Arkansas the punishment to be inflicted upon conviction for murder in the first degree was death by hanging.

By the act of March 3, 1885, chapter 341, section 9 (23 Stat., 385), it was provided that "all Indians committing against the property or person of another Indian or person murder (or other designated offenses) within any Territory of the United States or within or without an Indian reservation shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases."

By the act of June 7, 1897 (ch. 3, 30 Stat., 62, pt. 6), it was provided that "the laws of the United States and of the State of Arkansas in force in the

Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like cases."

By the agreement between the Commission to the Five Civilized Tribes and the Choctaw and Chickasaw nations of Indians, ratified by act of June 28, 1898 (ch. 517, 30 Stat., 495, 511), which agreement appears as section 29 of said act, it was agreed that the United States courts then existing or that might thereafter be created in the Indian Territory "shall have jurisdiction * * * of all persons charged with homicide * * * hereafter committed in the territory of said tribes, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried, and if convicted, punished as though he were a citizen or officer of the United States."

It was, therefore, under section 5339, Revised Statutes, as modified by the act of January 15, 1897, and the said provisions extending the same to offenses committed by Indians, that plaintiff in error was indicted and convicted.

(*b*) Statutes relating to jurisdiction:

A United States court having jurisdiction over the Indian Territory was established by the act of March 31, 1889, chapter 23 (25 Stat., 783). In section 5 of said act it was provided that the court "hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States,

committed within the Indian Territory, as in this act defined, not punishable by death or by imprisonment at hard labor."

By section 17 it was provided that the Chickasaw Nation and that part of the Choctaw Nation the boundaries of which were specifically set forth therein, should, from and after the passage of the act, be annexed to and become a part of the Eastern Judicial District of Texas for judicial purposes; and,

By section 18, it was provided that certain counties of Texas and the territory of the Indian nations described in section 17 should constitute a division of the Eastern Judicial District of Texas; and that a term of the circuit and district courts for said district should be held twice in each year at the city of Paris, and that the "United States courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory."

By the act of March 1, 1895, ch. 145 (28 Stat., 693), three judicial districts were created in the Indian Territory, and by the seventh section of that act it was provided that all prosecutions for crimes and offenses of which the United States court in the Indian Territory had jurisdiction should be had within the district in which said offenses were committed.

By section 9 it was provided that the United States court for the Indian Territory should have exclusive original jurisdiction of all offenses committed in said Territory of which the United States court in the Indian Territory then had jurisdiction, and after the first day of September, 1896, should have exclusive original jurisdiction of all offenses against the laws of the United States committed in said Territory, except such cases as the United States courts at Paris, Tex., Fort Smith, Ark., and Fort Scott, Kans., should have acquired jurisdiction of before that time; and that—

> all laws heretofore conferring jurisdiction upon United States courts held in Arkansas, Kansas, and Texas, outside of the limits of the Indian Territory, as defined by law, as to offenses committed in said Indian Territory, as herein provided, are hereby repealed, to take effect on September first, eighteen hundred and ninety-six; and the jurisdiction now conferred by law upon said courts is hereby given from and after the date aforesaid to the United States court in the Indian Territory: *Provided*, That in all criminal cases where said courts outside of the Indian Territory shall have, on September first, eighteen hundred and ninety-six, acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases. Every case, civil or criminal, pending in the United States court in the Indian Territory shall be tried and disposed of by the court where the same is pending, unless the venue therein be changed, as herein provided.

By section 29 of the act of June 28, 1898, ch. 517 (30 Stat., 511), in which the agreement between the Commission to the Five Civilized Tribes and the Choctaw and Chickasaw nations was ratified by Congress, it was provided:

> That the United States courts now existing, or that may hereafter be created, in the Indian Territory shall have exclusive jurisdiction * * * of all persons charged with homicide * * * hereafter committed in the territory of said tribes, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried, and, if convicted, punished as though he were a citizen or officer of the United States.
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> *Provided, That whenever a member of the Choctaw and Chickasaw nations is indicted for homicide, he may, within thirty days after such indictment and his arrest thereon, and before the same is reached for trial, file with the clerk of the court in which he is indicted his affidavit that he can not get a fair trial in said court; and it thereupon shall be the duty of the judge of said court to order a change of venue in such case to the United States district court for the western district of Arkansas, at Fort Smith, Arkansas, or to the United States District Court for the Eastern District of Texas, at Paris, Texas, always selecting the court that in his judgment is nearest or most convenient to the place where the crime charged in the indictment is supposed to*

have been committed, which courts shall have jurisdiction to try the case.

With the law in this condition, the act of June 16, 1906, ch. 3335 (34 Stat., 267), enabling the people of Oklahoma and Indian Territory to frame a constitution and state government and be admitted into the Union, etc., was enacted, and the provisions therein relating to prosecutions for offenses theretofore committed, but for which no indictments had been found, and the disposition of criminal cases pending in the courts of said Territories, as subsequently amended by the act of March 4, 1907, ch. 2911 (34 Stat., 1287), read as follows:

> That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed. (34 Stat., 275.)
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> Prosecutions for all crimes and offenses committed within the Territory of Oklahoma or in the Indian Territory, pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the federal courts, shall be transferred to and

be proceeded with in the United States circuit or district court established by this act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a State. Prosecutions for all such offenses committed within either of said Territories and pending in the supreme court of the Territory of Oklahoma, or in the United States court of appeals in the Indian Territory, upon the admission of such Territories as a State shall be transferred to the United States circuit courts created by this act for the district within which the offense was committed, which courts are hereby vested with the same jurisdiction to hear such cases as is now vested in the appellate courts of such Territories. Upon the affirmance or reversal by the circuit court of a judgment in any such case, like proceedings shall be had and like appeals and writs of error allowed as is provided in this section of this act in civil cases.

That all causes, proceedings, and matters, civil or criminal, pending in the supreme court of the Territory of Oklahoma, or in the United States court of appeals in the Indian Territory, not transferred to the United States circuit or district courts in said State of Oklahoma, shall be proceeded with, held, and determined by the supreme court or other final appellate court of such State as the successor of said supreme court of the Territory of Oklahoma and of the United States court of appeals in the Indian Territory, subject to the same right to review upon appeal or writ of error to the Su-

preme Court of the United States now allowed from the supreme or final appellate court of a State under existing laws.

That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territories become a State, not transferred to the United States circuit or district courts of the State of Oklahoma, shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States courts in the Indian Territory, with the right to prosecute appeals or writs of error to the supreme or appellate court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a State to the Supreme Court of the United States. All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be prosecuted to a final determination in the State courts of Oklahoma under the laws now in force in that Territory. (34 Stat., 1287.)

The provisions of this act were accepted by the constitutional convention of the State of Oklahoma on April 22, 1907.

2. *The admission of Oklahoma into the Union as a State did not abrogate the offense which plaintiff in error had committed, nor did it deprive the proper court of the power to proceed with the prosecution to a final judgment.*

It is apparent that it was the intention of Congress to preserve every offense that had theretofore been committed, and also every criminal proceeding which had been instituted. Whether the class of cases to which this belongs was not specifically mentioned purposely or by oversight it does not appear. But, as it was omitted, it must be controlled, to some extent at least, by general principles, keeping in mind, however, the intent of Congress as manifested by the various provisions of the enabling acts.

The general rule with reference to the effect upon an offense by the repeal of the law creating it before final judgment against the accused is thus stated in Bishop Stat. Crimes, section 177:

> It follows, therefore, that no proceedings can be carried on under a law which, being repealed, is not existing to give authority to the court. Consequently, if the common or statutory law, which authorizes a prosecution and conviction for a specific offense, is repealed or expired before final judgment, the court can go no further with the case. Even if a verdict has been rendered against the prisoner, sentence can not be pronounced, and he must be discharged. The same result follows if there is a judgment which has been vacated by an appeal or a writ of review.

> But, after final judgment, the execution of the sentence is not affected by a repeal of the law. This principle being general applies, of course, to *qui tam* and other actions under penal statutes and the like, as well as to indictments. If the repealing statute, though enacted, has not gone into operation, it produces no effect whatever in any case.

This rule, however, does not here apply, for two reasons:

(*a*) The statute creating the offense committed by plaintiff in error was not repealed by the admission of the State of Oklahoma, which embraced the territory wherein this crime was committed.

As above shown, this indictment is founded upon section 5339, Revised Statutes, as the place where the offense was committed, was, at the time when it was committed, under the exclusive jurisdiction of the United States. But while the enabling act, which authorized the creation of this Territory into a State and the acceptance of its terms, and the subsequent organization of the State withdrew this place from the exclusive jurisdiction of the United States, yet said section 5339 was not repealed thereby. It was just as efficacious after the creation of the State of Oklahoma in all places where the United States exercised exclusive jurisdiction, and as to all offenses which had theretofore been committed in violation thereof, as it was before. The reason why no punishment can be inflicted for an offense after the repeal of the statute creating such offense, and before final

judgment, is that after the repeal no law exists for the judgment to rest upon; that is, every element of the statute is abrogated, the part which fixes the penalty and authorizes its infliction as well as the part which creates and defines the offense, and the court is, therefore, stripped of all power to pronounce sentence. But, such is not the case where the statute remains unrepealed, although the territory where the offense was committed may be withdrawn from the operation of the statute. The offense still exists, and the penalty provided for the offense remains in full force and effect, and the courts are, therefore, not deprived of the power to impose the penalty.

A case decided at the present term of this court may be used as an illustration. In *James H. Holt* v. *United States* (No. 231) Holt was indicted for the murder of one Johnson in the reservation of Fort Worden, State of Washington, and the jury returned a verdict of guilty without capital punishment, the same as in the present case. Suppose, after this offense had been committed by Holt and before trial in the lower court, Congress had abolished this reservation and had transferred Fort Worden to the jurisdiction of the State of Washington, could it be insisted with any reason that by so doing it pardoned or abolished the crime which had theretofore been committed? Clearly, the offense would not have been affected in the least by such action, and the court having jurisdiction would have had the same authority to proceed to final judgment as it did with Fort Worden remaining still a military reservation.

The correct principle applicable to this case is thus stated by District Judge Marshall in *United States* v. *Baum* (74 Fed., 43, 46), quoting from Brown Jur., 224:

> The United States "has jurisdiction of all offenses which assails its rights, or the rights of its subjects, without regard to the place where the offender was at the time the offense was committed. The real theory of jurisdiction rests on the ground that the act or omission was against the sovereignty. The rule should be that we will punish all who offend against our sovereignty, if we can obtain control of the offender, without any regard to his nationality, or the place of the offense; and in this view alone rests true national protection.

In the present case, plaintiff in error, in taking the life of Voss, committed a crime against the United States, and the United States has not by any act of Congress signified any intention to modify its rule of law with reference to such crime, and the offense and the statutory provision for its punishment remain the same as they were when the murder was committed; and some court must, therefore, be vested with the power to inflict the punishment.

In *Stevens* v. *Diamond* (6 N. H., 330) it was held that a penalty incurred under a by-law of a town prohibiting horses from going at large in the highways of the town during certain seasons of the year might be enforced after the expiration of the year, the court drawing a distinction between an offense which

had been repealed by a subsequent act and an offense created by statute which expired at a certain time by its own limitation, holding that in the latter case the expiration of the act did not destroy the power to enforce the penalty for an offense committed while it was in force.

To the same effect see Bishop Stat. Crimes, section 182.

There is certainly greater reason for holding that where the act creating the offense has not been repealed, but the *locus* where the offense was committed has been merely withdrawn from the operation of the act, the court having jurisdiction is not deprived of the power to proceed therein to final judgment.

(*b*) If the creation of Oklahoma into a State had the effect of repealing section 5339, under which this indictment was drawn, in so far as it applied to the territory embraced within said State, yet this offense was kept alive by section 13, Revised Statutes, which reads as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

In *United States* v. *Reisinger* (128 U. S., 398), it was held that the words "penalty, liability, and

forfeiture," as used in said section 13, are synonymous with the word "punishment," in connection with crimes of the highest grade, and apply to offenses against the act of June 20, 1878 (20 Stat., 243), chapter 367, relating to claim agents and attorneys in pension cases.

3. *The United States District Court at Paris, Tex., was the only court which, after the creation of the State of Oklahoma, had jurisdiction to try this case.*

When the order of removal was entered by the court at Pauls Valley, Ind. T., that court lost all jurisdiction over the case, and thereafter jurisdiction was vested solely in the United States District Court at Paris, Tex. The case was then in the same condition as if the offense had been committed within the bounds of the Eastern Judicial District of Texas, and the indictment had been found in that district.

Certainly the enabling act could not have the effect of divesting this court of jurisdiction thereover, and vesting it elsewhere, unless its intent to do so was expressed in positive terms, or the implication was so clear that it could not be doubted. But no such intent is expressed, nor is there any warrant for its implication.

By section 16, as amended by the act of March 4, 1907, it was provided that prosecutions for all crimes and offenses committed within the Territory of Oklahoma and the Indian Territory, *pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory*, upon the admission of such Territories as a State, which, had they

been committed within a State, would have been cognizable in the federal courts, "shall be transferred to and proceeded with in the United States circuit or district court established by this act," etc.—and by section 20 it was provided that all causes, proceedings, and matters, civil or criminal, pending in the above-mentioned courts at the time said Territories should become a State, "not transferred to the United States circuit or district courts in said State of Oklahoma, shall be proceeded with, held, and determined by the supreme court or other final appellate court of such State as the successor of said supreme court of the Territory of Oklahoma and of the United States court of appeals in the Indian Territory," etc.

That is, the act, by its terms, is expressly restricted to cases *pending at the time of the admission of such Territories as a State, in the district court of the Territory of Oklahoma or in the United States courts in the Indian Territory*, and there is no clause or phrase in the act which contains any suggestion that a case pending at that time in any other court than those expressly mentioned was to be transferred under its provisions.

There is nothing in the act to indicate whether or not the omission of cases which had been transferred to either the United States district court at Paris, Tex., or to the district court at Fort Smith, Ark., under the proviso in section 29 of the act of June 28, 1898, was an oversight or intentional. However, it could very well have been intentional, as the reason

for allowing the removal of a case at the instance of a citizen of the Choctaw or Chickasaw nations was to enable such citizens to avoid local prejudice, and the prejudice in such case still remained after the admission of the Territories into the Union as a State.

But, if the omission was the result of oversight, the effect is the same. On February 22, 1848, Congress passed an act to regulate the exercise of the appellate jurisdiction of the Supreme Court in certain cases and for other purposes, which provided, among other things, that its provisions should apply to all cases which might be pending in the supreme or other superior courts for any territory of the United States which might thereafter be admitted as a State into the Union, at the time of its admission, and all cases in which judgments or decrees should be rendered in such supreme or superior courts at the time of such admission and not previously removed by writ of error or appeal. It was held in *McNulty* v. *Batty* (10 How., 71, 79, 80) that the act did not apply to cases which had, before the admission of the Territory as a State, been appealed to the Supreme Court of the United States, the court saying:

> The section was drawn, doubtless, under the supposition that if the suit was pending here at the time of the admission of a Territory into the Union as a State, on appeal or writ of error, no legislation was necessary to preserve it or give effect to the jurisdiction of the court over it; an opinion, as we have seen, founded in error.

Certainly an omission growing out of oversight can not be cured by judicial interpretation any more than one resulting from a mistake of law.

4. *Review of authorities cited by plaintiff in error.*

In support of his contention that the United States District Court at Paris, Tex., was by the enabling act and the creation of Oklahoma into a State deprived of jurisdiction of this case, counsel for plaintiff in error, on pages 19, 20, and 21 of his brief, cites many authorities, but they do not contradict the position here taken. The following are the most important cases cited from the decisions of this court:

In *United States* v. *Boisdore's Heirs* (49 U. S., 113, 120) the facts were, that in 1884 Congress passed an act which enabled claimants to land in the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims, and allowed an appeal from the district court to the Supreme Court of the United States within one year from the rendition of a judgment or decree; and further provided that any claim which should not be brought by petition before the district courts within two years from the passage of the act, or which, after being brought before said courts, should, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, should be barred.

In 1884 Congress passed an act which provided that so much of the expired act of May 25, 1824, as related to the State of Missouri, be revived, reenacted, and continued in force for the term of five years and no longer, and extended its provisions to other

States. The court held that where a judgment had been rendered in the district court, and an appeal taken therefrom to the Supreme Court within the time designated, the expiration of the statute as to cases pending in the district courts did not deprive the Supreme Court of jurisdiction to hear the case upon appeal. The principal ground of the court's decision was that while a certain period of time was fixed for the institution of suits and their prosecution in the district court, yet the law itself did not expire, but still remained in existence, and that consequently the Supreme Court had authority to act thereunder.

This authority is in accord with the Government's contention in this case, that as the creation of Oklahoma into a State did not repeal the statute upon which the indictment against plaintiff in error was founded, the court having cognizance of the case was not deprived of jurisdiction to try the same and pronounce judgment therein.

In *McNulty* v. *Batty* (10 How., 71) suit had been commenced by writ of attachment in the Territory of Wisconsin in 1845, and the property was attached therein. Subsequently, defendants having pleaded, judgment was rendered in their favor. The case was then removed to the Supreme Court of the Territory, and on July 31, 1847, the judgment of the lower court was there affirmed, and an appeal was taken therefrom to this court, the date of the citation being November 20, 1847. Wisconsin was admitted into the Union as a State on May 29, 1848. The act under which the State was admitted made provision for the

transfer of all *federal* cases pending in the courts at the termination of the territorial government to the federal courts, but no provision was made for the other class of cases to which the one in question belonged, which, it was held, left it for the state authorities to pass laws regulating their transfer. The court also held that by the admission of Wisconsin to the Union the territorial government ceased to exist and all authority under it, including the laws organizing its courts of justice and providing for a revision of their judgments in this court by appeals or writs of error. A further ground upon which the decision dismissing the appeal was based was, that after the termination of the territorial government there was no court in existence to which the mandate of this court could be sent to carry into effect its judgment, and the power of the court would therefore be incomplete and ineffectual were it to consent to a review of the case, and that the result would have been the same had the case been transferred to a federal court, as it was one not of federal jurisdiction, and if the judgment were affirmed or reversed and sent down to that court, it would possess no power to carry the mandate into execution.

That case was wholly unlike the present one. Here the offense for which plaintiff in error was indicted was one against the United States, and one over which, except by positive legislation to the contrary, the United States courts alone possessed jurisdiction, and the court in which the case was pending was not abolished by the admission of Oklahoma as a State,

and it had ample power to carry its judgment of imprisonment into effect. In fact, inasmuch as the offense was against the United States, except by consent of the state authorities, Congress could not have vested in the state courts the power to punish plaintiff in error for the same.

In *Norris* v. *Crocker* (13 How., 429), it was held that where an act authorizing the recovery of a penalty was repealed after action begun, but before judgment, the repeal of the statute deprived the court of jurisdiction over the subject-matter, and the action was barred thereby.

In *Ins. Co.* v. *Richie* (5 Wall., 541), it was held that where suits were brought in a federal court under an act which authorized suits involving internal revenue to be brought in such courts in actions between citizens of the same State, and the act was repealed, all such suits which were pending at the passage of the repealing act fell.

In *Ex parte McCardle* (7 Wall., 506) it was held that where a habeas corpus case had been appealed to this court under a certain statutory provision authorizing such an appeal, which provision was, during the pendency of the case here, repealed, the court could not pronounce judgment in the case, as it no longer had jurisdiction over the appeal.

United States v. *Tynen* (11 Wall., 88) was an indictment for unlawfully using a forged and counterfeited certificate of citizenship, under an act regulating seamen on board of public and private vessels

of the United States. While the indictment was pending another act was passed which, by implication, repealed the provisions of the former act. The court held that:

> By the repeal of the thirteenth section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction nor any valid judgment pronounced upon conviction unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed (p. 95).

In *Railway Co.* v. *Grant* (98 U. S., 398) a judgment for $2,250 had been procured by Grant, and an appeal was taken therefrom to this court under an act which authorized an appeal from judgments of the value of $1,000 and upward. Before this court had passed thereon, this provision of the statute was repealed by the passage of an act authorizing an appeal from judgments of the value of $2,500 and upward. This court held that after the passage of this act it had no further jurisdiction over the case.

In *South Carolina* v. *Gaillard* (101 U. S., 433) it was held that the act of the general assembly of South Carolina, passed June 29, 1877, entitled "An act to provide the mode of proving bills of the bank of the State tendered for taxes, and the rules of evidence applicable thereto," created no new contract between the State and the taxpayer or bill holder, but merely provided a new remedy which

formed no part of the contract created by the charter of the bank; and that after that act was repealed, a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them.

None of these cases have any material bearing upon the question here presented, and the other federal and state cases cited are of the same nature. In fact, the propositions asserted by counsel that "When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute;" and that "If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the appeal finds them," do not apply to this case.

It is true that the special provision of section 29 of the act of June 28, 1898, which authorized the removal of causes at the instance of a member of the Choctaw or Chickasaw nations to the United States district court at Paris, Tex., was repealed by the admission of Oklahoma as a State, as to all cases that should thereafter arise. But, in so far as it was applicable *to the present case*, it was not repealed. The above-quoted sections of the enabling act clearly show that *it was the purpose of Congress to preserve every case which had theretofore been brought, regardless of where it was pending;* and, moreover, as there was no express repeal of the former act, it was repealed

only to the extent that the laws creating Oklahoma into a State were in conflict with its provisions. As has been seen, the enabling act made no provision whatever for cases which had previously been removed under the proviso of the act of 1898, and consequently, there being no conflict as to them, said proviso to that extent remained in full force and effect, and the cases removed thereunder had to proceed to final judgment in the court where found.

Furthermore, if it were entirely repealed, as above shown, this case would be saved by section 13, Revised Statutes.

But under no circumstances can the principles stated have any application to a case of this character. There is a material difference between the effect upon pending cases of the repeal of an act which creates an offense, or of an act which authorizes appeals, and the repeal of an act authorizing a change of venue, after the venue has been changed. When an act creating a criminal offense is repealed, as heretofore said, there is no further authority for the court to impose a penalty for such offense, and the act partakes of the nature of a pardon for all past offenses. When a case is pending in an appellate court, and the right of appeal in such cases is taken away, the effect is to place the case on precisely the same plane as cases then pending or thereafter to be brought in the lower court, and the act has the effect of affirming the judgment of the court below. In such cases the legislative intent is manifest, though not expressed in positive language; but where

a case has been removed under an existing statute, from one jurisdiction to another, and the act authorizing its removal is subsequently repealed, without special reference to what disposition shall be made of such class of cases, such case can not be affected by the repeal. As the offense still remains in existence, it can not be inferred that no further prosecution therefore shall be had, and the case must proceed in some court; and as the court wherein it is pending is one properly organized to try such cases, in the absence of an expressed intent to the contrary, it must be inferred that such court is to retain control thereof until it is finally determined. In short, the principles relied upon apply when the repealing act destroys the offense, or abrogates a remedy by which alone relief can be obtained, and not where the remedy repealed is a mere incident or step in the proceeding which was not essential to the prosecution of the case to a final judgment, but merely changes the status of the case.

5. *The order entered by the United States court at Pauls Valley, Ind. T., directing a change of venue from that court to the United States court at Paris, Tex., is valid, and vested jurisdiction in the latter court to hear the case.*

The jurisdiction of the United States district court at Paris, Tex., must depend upon the validity of the order directing a change of venue. It is unnecessary to indulge in any presumption with reference to the jurisdiction of that court, because if the order of the court at Pauls Valley was valid, jurisdiction imme-

diately vested in the Paris court, and it was its duty to proceed with the case. The objection suggested rather than argued in brief for plaintiff in error is, that the order does not recite the jurisdictional facts, and that they are not made to sufficiently appear elsewhere in the record, and it is concluded therefore that the order is void.

This conclusion is erroneous.

The proviso of the statute under which the order was made required that three facts appear to justify a removal; first, that the party accused of the homicide be a member of the Choctaw or Chickasaw Nation; second, that he file with the clerk of the court his affidavit that he could not get a fair trial in that court; and, third, that the application be made within thirty days after the finding of the indictment and arrest of plaintiff in error thereon. When the affidavit was filed, the other conditions existing, it became the imperative duty of the judge to order a change of venue to either the United States district court at Paris, Tex., or at Fort Smith, Ark., it being his duty to determine which was the most convenient to the place where the crime charged was supposed to have been committed. It is true that the order in question does not recite in positive terms either that plaintiff in error is a member of the Choctaw or Chickasaw Nation, or that the required affidavit was filed; nor is there any recital in the indictment or elsewhere in the record that plaintiff in error was a member of either of said nations, nor does the record contain any copy of

the affidavit required by the statute; but the order, when taken with what does appear elsewhere in the record, and especially when viewed in the light of the decisions of this court with reference to what shall be taken as presumed as to the validity of proceedings in United States courts, is entirely sufficient and can not be here attacked.

The indictment was filed in the court at Pauls Valley, Ind. T., on May 28, 1906, and the certificate of the clerk recites that a certified copy of the same was delivered to Hendrix, who was then in the United States jail at Pauls Valley, on May 29, 1906; and while the date of the order changing the venue does not appear in that part of the record which was sent to this court, yet the certified copy of the indictment and the copy of the orders of record at Pauls Valley were filed in the United States court at Paris, Tex., on June 3, 1906, or eight days after the indictment had been found. Consequently, the statutory requirement that the motion for change of venue should be made within thirty days after the finding of the indictment, and the arrest of the defendant thereon, was strictly complied with. (Rec., p. 8.)

The record conclusively shows that plaintiff in error was in the custody of the court, because, as stated, a copy of the indictment was served upon him in jail at Pauls Valley, and this order recites that the motion for change of venue was made by him in person; and a subsequent order made in the court at Pauls Valley shows that he entered a

motion to be released from custody on bail, which was denied by the court. (Rec., p. 7.)

Furthermore, the affidavit of R. McMillan, one of plaintiff in error's attorneys of record, which was filed in support of his motion that the case be transferred to Garvin County, Okla., shows that it was upon his advice that the venue was changed, it being done on account of the supposed partiality of the presiding judge (Rec., p. 9); and there is no suggestion in this affidavit that the affidavit required by the statute was not presented to the court at Pauls Valley, nor is there any intimation therein that any jurisdictional fact did not exist at the time the order was made, or that the court in any respect exceeded his jurisdiction in making the order; or that it was for any reason invalid or erroneous at the time it was entered.

Moreover, in the motion itself there is no suggestion that the order by which the case had been transferred to the court at Paris, Tex., from Pauls Valley, Ind. T., was invalid, or in any respect defective; the sole ground for the motion being the supposed effect of the provisions heretofore considered of the enabling act under which Oklahoma became a State. (Rec., pp. 8 and 9, 21 and 22.) No suggestion of irregularity in the order, or that it was unauthorized, was made in the motion for a new trial, nor is such ground stated and relied upon in the assignment of errors.

There being no exception taken by plaintiff in error at the time the order of removal was made, and the proceeding upon which the order was based not having been preserved by a bill of exceptions, the order is not

before this court on appeal, but any attack now made thereon is purely collateral; and the United States insists that it is not open to such attack for the following reasons:

(*a*) *The United States court at Pauls Valley, Ind. T., had jurisdiction of both the subject-matter and of the person of William Hendrix, and the record failing to show that the facts justifying the removal, or either of them, existed, the order must be presumed to be valid.*

It is unnecessary to review the almost innumerable decisions of the several courts of last resort with reference to the question of presumption of the regularity of proceedings in courts of general jurisdiction, and also in courts of special and limited jurisdiction, between many of which there is irreconcilable conflict, because this court has clearly defined the rule with reference thereto by which it is governed.

In *Ex parte Watkins* (3 Pet., 193) Watkins sued out a writ of habeas corpus, insisting that he was illegally confined in jail in the District of Columbia under a void judgment, the judgment being void because, he contended, he had committed no offense under the laws of that jurisdiction. The court discharged the writ, holding that the judgment of the trial court was conclusive, and not subject to collateral attack, saying among other things:

> Had any offense against the laws of the United States been, in fact, committed the Circuit Court for the District of Columbia could take cognizance of it. The question whether any offense was or was not committed—that

is, whether the indictment did or did not show that an offense had been committed—was a question which that court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, can not be disregarded (p. 206).

The cases are numerous which decide that the judgment of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the Circuit Court in a criminal case is of itself evidence of its own legality and requires for its support no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We can not usurp that power by the instrumentality of the writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.

Voorhees v. *United States Bank* (10 Pet., 449, 472) involved the validity of a sale of land made under the foreign attachment laws of Ohio, the sale being collaterally attacked in an ejectment pro-

ceeding. The laws under which the Ohio court proceeded were purely statutory, and although many jurisdictional facts were not made to appear in the record, yet the proceedings were held to be valid on the ground that the judgments of courts of general jurisdiction are presumed to be valid, unless the contrary is made to appear, the court upon this question saying:

> The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction, to which was added, by the act of 1805, power to issue writs of attachments, and order a sale of the property attached, on certain conditions; no objections, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached. The process which they adopted was the same as prescribed by the law; they ordered a sale, which was executed, and on the return thereof gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated

> becomes a part of their record, which thenceforth proves itself without referring to the evidence on which it has been adjudged.

Grignon v. *Astor* (2 How., 318, 319, 338) involved the validity of a sale of land under proceedings authorized by statute in the State of Michigan, and the court, after a review of the authorities with reference to the presumption of the validity of court proceedings, held the sale valid. In defining what constituted jurisdiction the court said (p. 338):

> The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action. (Quoting from 6 Pet., 709.)

And, again:

> If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. (Quoting from 12 Pet., 718.)

And in defining the distinction between courts of general jurisdiction and those of limited and special jurisdiction the court said (p. 341):

> These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of

special and limited jurisdiction, which are created on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities which may be entirely disregarded. (3 Pet., 205.) They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court and those whose proceedings are nullities if their jurisdiction does not appear on their face is this: A court which is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings or they are nullities.

Harvey v. *Tyler* (2 Wall., 328, 342) was a case involving the validity of the sale of land under certain statutes of the State of Virginia, and upon the question of presumption of the judgment of a court acting under authority of special statutes the court said:

> The jurisdiction which is now exercised by the common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create, for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law but often in derogation of that law.
>
> In all cases where the new powers thus conferred are to be brought into action in the usual form of common law or chancery proceedings we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined nor easily ascertained at all times. There is, however, one principle

> underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. *It is that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a case all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceeding for that purpose.* The only difficluty in applying the rule is to ascertain the question of jurisdiction.

Applegate v. *Lexington, &c., Mining Co.* (117 U. S., 255, 270), involved the title to land under court proceedings in the State of Kentucky. After a review of the authorities upon this question, the court thus stated its conclusion:

> The result of the authorities and what we decide is, that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, nonresident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid.

By these authorities it is well settled that, where special power is conferred by statute upon a court

of general jurisdiction, the same rule of presumption exists with reference to the regularity of proceedings under such power as exists as to all other proceedings of such court, the two prerequisites necessary to create the presumption of regularity being, first, that the court have jurisdiction of the subject-matter, and, second, that it have jurisdiction of the person. No other rule in fact could be applied to the United States courts, because they are not only created by statute, but their jurisdiction and method of procedure are defined by statute.

As above shown, no doubt can exist in the present case as to either of these prerequisites. The United States courts in the Indian Territory were expressly given power to transfer a case of homicide when the accused was a member of the Choctaw or Chickasaw Nation to the United States court at Paris, Tex. It was for the court to decide, when application was made for change of venue, whether the facts warranting the change existed; that is, whether the applicant was a member of the Choctaw or Chickasaw Nation and whether the proper affidavit had been filed, and the passing of the order of the court directing the transfer raises a conclusive presumption that the court made proper inquiry into these matters and found that the facts authorizing the transfer existed.

That the court did make such investigation, and that his conclusion was based upon facts presented, is clearly shown by the language of the order, wherein it is recited that the court, "*being well advised in the*

premises, doth grant said motion, and directs the clerk of this court to transmit this cause as to William Hendrix to the United States court at Paris, Tex." (Rec., p. 7.)

Counsel cites the case of *In re Johnson* (167 U. S., 120) in support of his contention that the Paris court never had jurisdiction of Hendrix's person. The facts in that case were that Johnson committed the offense of rape in the Indian Territory on July 24, 1896; on the same day a warrant was issued by the commissioner for the southern district of the Indian Territory; on the 9th of October, thereafter, he was indicted; on October 17 he was arraigned, tried, and convicted, and was sentenced to death. On July 25, the day after the offense was committed, a warrant was issued for Johnson by a commissioner for the eastern district of Texas, and was placed in the hands of the marshal for that district, who demanded of the marshal for the southern district of Indian Territory the surrender of Johnson, but same was refused. There was no United States court in session for the eastern district of Texas when the offense was committed, and none was held until after the accused had been convicted and sentenced.

Under the act of March 31, 1889, as has been heretofore shown, the United States District Court for the Eastern District of Texas had exclusive jurisdiction over capital offenses committed within the Indian Territory, but the act of March 1, 1895, provided that the United States courts in the Indian Territory should have exclusive original

jurisdiction of all offenses committed against the laws of the United States in said Territory, except such cases as the courts at Paris, Tex., Fort Smith, Ark., and Fort Scott, Kans., "*shall have acquired jurisdiction of before*" *September 1, 1896;* and the question was whether or not the United States court at Paris, Tex., had acquired jurisdiction of the case against Johnson before September 1, 1896. This court held that it had not, because it appeared that nothing had been done but to issue a warrant, which was never served, and there was nothing to show that a demand was made for the prisoner's person before the 1st of September, 1896, the court holding that jurisdiction was acquired under the statute, not by the commission of the offense, but by service of process upon the person. As stated, the record in this case shows that Hendrix was present in court when this order of removal was made, and that he was at the time in the custody of the marshal. The record further shows that he was present when the case was tried at Paris; but the effect would be the same had he escaped and his person not been in the custody of the Paris court until the case was tried, because under the terms of the statute the United States court at Pauls Valley lost jurisdiction of both the case and the person of the accused when the order of removal was entered, and it was immediately vested in the court at Paris, Tex.

(*b*) *The change of venue was made on plaintiff in error's own motion, and he can not now be heard to*

impeach its validity on the ground that the facts authorizing the transfer did not exist.

It is a well-recognized principle that when a defendant invokes certain action upon the part of the court he can not thereafter be permitted to take advantage of the condition brought about by such action. In *Ball* v. *United States* (140 U. S., 118) the facts were that three parties, Millard Ball, John Ball, and Robert Boutwell, had been indicted in the Circuit Court of the United States for the Eastern District of Texas for the murder of one Box, and on the trial Millard Ball was acquitted and John Ball and Boutwell were convicted and sentenced to death. The condemned brought the case to this court, and it was held that the indictment was fatally defective, and the judgment was reversed and the case remanded with direction to quash the same. All three were again indicted, and Millard Ball filed a plea of former jeopardy and acquittal, and John Ball and Boutwell filed a plea of former jeopardy by reason of their former trial and conviction. Both pleas were overruled, and all three defendants pleaded not guilty, and were convicted and sentenced to death. This court reversed the case as to Millard Ball, holding that his plea of former jeopardy was good, but affirmed the sentence as to John Ball and Boutwell on the ground that they had invoked the action of this court upon the judgment of the court below, and therefore could not take advantage of a jeopardy which had been annulled at their own instance.

Murphy v. *Massachusetts* (177 U. S., 155) also illustrates this rule. Murphy was tried in the state court of Massachusetts on a charge of embezzlement, was convicted and sentenced to imprisonment for a term, one day of which was to be in solitary confinement and the rest at hard labor. He remained in confinement for nearly three years and then sued out a writ of error, and the judgment was reversed on the ground that the sentence was unconstitutional. The case was remanded to the court below for resentence. Before imposing the new sentence the court said that as the prisoner had already suffered one term of solitary confinement the court would not impose another if a written waiver by the prisoner of the provision therefor were filed. He declined to file such a waiver and the sentence was accordingly imposed. Upon his taking steps to have the sentence annulled, it was held that inasmuch as the former sentence had been set aside at his own instance, it afforded no protection against the subsequent sentence; the court saying—

> But, however that may be, the plea of former jeopardy or of former conviction can not be maintained because of service of part of a sentence, *reversed or vacated on the prisoner's own application* (p. 162).

In *Perteet* v. *the People* (70 Ill., 171, 178) Perteet had been convicted for murder in Cook County, Ill., had taken the case to the Supreme Court by writ of error and had secured a reversal of the same. His counsel thereupon obtained a certified copy of the

opinion of the Supreme Court, and presented same to the lower court, and had the case redocketed. He then presented a petition for change of venue, and the court ordered that the venue be changed to Will County. He was there subsequently tried, convicted, and condemned to death. On a second appeal one ground for reversal insisted upon was, that when the change of venue was ordered, the lower court had no juridsiction over the case, in that no *remittur* had been filed from the Supreme Court. This contention was overruled, the court among other things saying:

> Instead of, and in lieu of, the *remittur*, the defendant himself, as shown by the record, filed in the criminal court a certified copy of the opinion of this court in the cause. This evidence produced to the criminal court was not the best evidence—it was not the technical evidence the law required; but, at the same time, it proved to the court each and every fact that the *remittur* would, had it been filed; *and when the defendant himself produced this evidence of the action of this court, and called into action the powers of the criminal court, which were suspended by the writ of error, does it now lie in his mouth to object that the criminal court acted on insufficient evidence? Did he not, by his own voluntary act, waive evidence of a certain fact, which he now insists is error?*

State v. *McEvoy* (68 Iowa, 355) involved the validity of a change of venue in a criminal case pending before a justice of the peace. At the instance of the

defendant the case was, upon a ground not justified by law, sent to a wrong justice. The court in considering the matter, said:

> Defendant alleged as a reason why the cause should not be sent to Justice Huff that he was a material witness, and claimed that this afforded a legal ground for sending it to another justice. He induced Justice Morrison to adopt that view, although it was erroneous, and when the cause was ordered to be sent to Justice Blood he not only consented to the order, but requested that it be made, and at no stage of the proceedings before the appeal to the district court did he make any question as to the jurisdiction of that justice to try the cause. We know of no legal ground upon which he can now be permitted to question the jurisdiction of the justice. Justice Blood had jurisdiction of the subject-matter of the action. All that can be claimed is that he did not acquire jurisdiction of the person of the defendant in the particular mode prescribed by the statute. But defendant might waive his right to be brought to trial on the charge in that particular manner, and we think he did waive it when he requested and consented that he be taken before Justice Blood for trial (p. 357).

To the same effect, see *People ex rel* v. *Court of Special Sessions, State and County of New York* (4 Hun., 441).

(*c*) It is further suggested as material that the order of removal does not recite to which of the United States courts at Paris, Tex., the case was transferred, and that the note of filing made by the

clerk at Paris does not recite of which court he was clerk.

The failure to designate in the order that the case was removed to the *district* court at Paris was immaterial, as the statute expressly directed that it was to that court alone it could be removed, and it was that court alone which was vested with jurisdiction to try the same. Furthermore, A. O. Brackett, whose deputy, J. B. Dailey, filed the transcript of the record at Paris, was clerk of the district court, and was not clerk of the Circuit Court, of which fact both the United States District Court at Paris had, and this court has, judicial knowledge. Moreover, the record shows that the case was tried in the United States District Court, and not in the Circuit Court.

(*d*) Plaintiff in error William Hendrix was in fact a Choctaw Indian, and this court will take judicial knowledge of such fact.

The records of the Department of the Interior show the following facts, as appear from a certificate from that department, which is as follows:

> DEPARTMENT OF THE INTERIOR,
> COMMISSION TO THE FIVE CIVILIZED TRIBES.
>
> Commissioners:
> TAMS BIXBY.
> THOMAS B. NEEDLES.
> C. R. BRECKINRIDGE.
> WM. O. BEALL, *Secretary.*
>
> Address only the Commission to the Five Civilized Tribes, Muskogee, Indian Territory, November 4, 1904.

The honorable the Secretary of the Interior.

SIR: The Commission to the Five Civilized Tribes has the honor to transmit herewith a schedule of citizens by intermarriage of the Choctaw Nation, numbers 1054 to 1199, inclusive, found by the commission to be entitled to enrollment and who were living on September 25, 1902, as provided by the act of Congress approved July 1, 1902, entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes" (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw nations at a special election held September 25, 1902.

Decisions enrolling the persons enumerated in this schedule have heretofore been rendered by the commission and copies thereof furnished Mansfield, McMurray & Cornish, attorneys for the Choctaw and Chickasaw nations, and also the applicants. The attorneys for the Choctaw and Chickasaw nations were advised that they would be allowed fifteen days from the date of the rendition of said decisions within which to file with the commission such protest as they desired to make against the action of the commission in enrolling the persons enumerated in such decisions and make satisfactory proof of service of protest upon the applicants enumerated therein. No protests have been offered by the attorneys for the Choctaw and Chickasaw nations to the action of the commission in enrolling the persons whose names are included in the schedule herewith transmitted, and in accordance with the provisions

of the acts of Congress approved June 28, 1898 (30 Stat., 495), and July 1, 1902 (32 Stat., 641), the persons enumerated in this schedule have been enrolled by the commission as intermarried citizens of the Choctaw Nation.

The tribal roll, if found on roll, from which the persons named in the schedule are identified, and such other data as will properly identify the persons enumerated therein, here follow in the same order as in the schedule:

* * * * *

No.	Name.	Roll county.	Remarks.
1137	Hendrix, Evelina		Wife of William Hendrix, Choctaw roll number 14447.

Respectfully submitted.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRECKINRIDGE, *Commissioner.*

Through the Commissioner of Indian Affairs.
6 inclosures.

CHOCTAW ROLL, CITIZENS BY BLOOD.

No.	Name.	Age.	Sex.	Blood.	Census card No.
14447	Hendrix, William	24	M	1/8	4616

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 11, 1903.

Approved:

THOS. RYAN,
Acting Secretary.
(L. R. S.)

* * * * *

CHOCTAW ROLL, CITIZENS BY MARRIAGE.

No.	Name.	Age.	Sex.	Blood.	Census card No.
1137	Hendrix, Evelina	22	F.	I W	4616

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Nov. 16, 1904.

Approved:

THOS. RYAN,
Acting Secretary.
(L. R. S.)

* * * * *

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, November 25, 1910.

I, C. F. Hauke, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true excerpt copy of the original as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

(Signed) C. F. HAUKE,
Acting Commissioner.

[Seal of the Office of Indian Affairs.]

This must necessarily be the William Hendrix here under indictment, as the record shows that the name of plaintiff in error's wife is Evelina.

Under the statutes directing the enrollment of the Indians, records thereof must be kept in the Interior Department, and the courts will take judicial knowledge of such records. (*Knight* v. *United States Land Asso.* (142 U. S., 161, 169).

II.

The court did not err in refusing to permit Evelina Hendrix, the wife of plaintiff in error, to testify in his behalf.

Plaintiff in error relies upon section 858, Revised Statutes, wherein it is provided that in the courts of the United States no witness shall be excluded in any action on account of color, or in a civil action because he is a party to or interested in the issue of the trial * * *. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, and in trials at common law and in equity and admiralty.

It is well settled that this section has no application to criminal trials, and that the rules of evidence in such cases, unless expressly modified by Congress, are those which existed when the judiciary act of 1789 was passed.

In *United States* v. *Reid* (12 How., 361, 366) two defendants, Reid and Clements, were jointly indicted and on the trial of Reid, Clements was offered as a witness in his behalf. The court held that Clements was not competent, though he was a competent wit-

ness under the laws of Virginia, wherein the case was tried, the court saying:

> The rules of evidence in criminal cases are the rules which were in force in the respective States when the judiciary act of 1789 was passed. Congress may certainly change it whenever they think proper within the limits prescribed by the Constitution. But no law of a State made since 1789 can affect the mode of proceedings or the rules of evidence in criminal cases.

To the same effect is *Logan* v. *United States* (144 U. S., 263, 298, 302), wherein the same rule was applied with reference to the competency of a witness who had been convicted for a felony in another State. (See also *United States* v. *Black*, 1 Hask., 570; *United States* v. *Hawthorne*, 1 Dillon, 422; *United States* v. *Brown*, 1 Sawyer, 531; *United States* v. *Hall*, 53 Fed., 352.)

The case of *Lucas* v. *Brooks* (18 Wall., 436, 453), cited by plaintiff in error, was a civil case, and has no bearing upon the present question.

III.

Plaintiff in error is not entitled to a new trial for the reasons set forth in certain affidavits which it is claimed were made by members of the jury.

There are three reasons why the judgment of the court should not be reversed on this ground:

1. These affidavits undertake to detail a misunderstanding of the jurymen as to the effect of the verdict

"Guilty, without capital punishment," when jurymen can not be permitted to impeach by affidavit their verdict upon such ground.

The rule laid down in *Mattox* v. *United States* (146 U. S., 140, 149), with reference to what affidavits of jurymen may be received by the courts, is as follows:

> On a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. *But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence* although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts and declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.

This rule clearly excludes affidavits of the character here presented.

2. The order overruling the motion for a new trial does not recite whether the affidavits were or were not considered by the trial court. Therefore, if the affidavits were of such character that it was the duty of the court to consider them, it will be presumed that the court committed no error and considered them; and the question whether a new trial should be granted being one within the court's discretion, and he having determined that the motion should be overruled, it is not subject to review by this court.

(*Henderson* v. *Moore*, 5 Cranch, 11, 12; *Marine Ins. Co.* v. *Young*, 5 Cranch, 187, 191; *McLanahan* v. *Ins. Co.*, 1 Pet., 187; *United States* v. *Beaufort*, 3 Pet., 12, 32; *Indianapolis, etc., R. R. Co.* v. *Horst*, *Mattox* v. *United States*, 146 U. S., 140, 147.)

3. The affidavits are not made a part of the bill of exceptions, and consequently constitute no part of the record in this court.

This objection alone is conclusive, regardless of how meritorious this ground for new trial might otherwise be.

For the foregoing reasons the judgment of the United States District Court at Paris, Tex., should be affirmed.

J. A. FOWLER,
Assistant Attorney-General.

NOVEMBER, 1910.

○

Where the record is not here, and the jurisdictional facts are admitted, and the order recited that the court was well advised in the premises, this court will not hold that the court to which the case was removed on petition of plaintiff in error himself did not acquire jurisdiction because the petition did not state all the jurisdictional facts required by the statute authorizing the removal.

While the repeal of a statute giving special jurisdiction to a court may operate to deprive that court of the jurisdiction so conferred, the mere enactment of a subsequent statute which obviates future application of the earlier statute does not amount to its repeal or affect jurisdiction already acquired.

The provisions of the Oklahoma enabling act of June 16, 1906, c. 3335, 34 Stat. 267, as amended March 4, 1907, c. 2911, 34 Stat. 1287, transferring criminal cases pending in the United States courts of the Indian Territory to the courts of Oklahoma, did not repeal the act of June 28, 1898, c. 517, 30 Stat. 511, or affect cases which had already been transferred under that act to the United States District Court for the Eastern District of Texas.

In this case *held* that it was not error for the trial court to refuse to allow the wife of one accused of murder to testify. *Logan* v. *United States*, 144 U. S. 263.

There was no error on the part of the trial court in denying a motion for a new trial based on affidavits of some of the jurors that they agreed to the verdict on the understanding between themselves and other jurors that the punishment of the degree found would be less than that imposed by the court. *Mattox* v. *United States*, 146 U. S. 140.

THE facts are stated in the opinion.

Mr. James G. Dudley for plaintiff in error:

Jurisdiction in a criminal case is never presumed, but must always be shown, is never waived by a defendant, and want of jurisdiction can be attacked at any stage of a criminal proceeding or even collaterally. *In re Neilson*, 131 U. S. 176; *United States* v. *Rogers*, 23 Fed. Rep. 662; *In re Mills*, 135 U. S. 270; *In re Graham*, 138 U. S. 451.

District Courts of the United States have no jurisdiction to try capital cases, no jurisdiction to try a person indicted for murder, charged to have been committed on land, and no power or jurisdiction to sentence a person for a capital

offense so committed, either to suffer death or life imprisonment. Section 563, Rev. Stat. The Circuit Courts of the United States have exclusive jurisdiction of all capital cases. Section 629, Rev. Stat., subd. 20.

The indictment in this case charges a crime (murder) punishable by death, § 5339, Rev. Stat., and the offense is no less capital, although the jury by their verdict found defendant guilty as charged "without capital punishment." *Fitzpatrick* v. *United States*, 178 U. S. 304; *Goodshot* v. *United States*, 104 Fed. Rep. 257.

The United States court in the Indian Territory had jurisdiction until taken away by the enabling act. Jurisdiction was taken away without saving and excepting cases pending by § 20 of the enabling act, as amended by the act of March 4, 1907.

When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute. *United States* v. *Boisdore*, 8 How. 113; *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398; *United States* v. *Tymen*, 11 Wall. 88; *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 88; *McNulty* v. *Batty*, 10 How. 79; *Ex parte McCradle*, 7 Wall. 514; *Downes* v. *Bidwell*, 182 U. S. 675; *Murphy* v. *Utter*, 186 U. S. 109; *Bird* v. *United States*, 187 U. S. 124; *Colt* v. *Young*, 2 Blatchf. 473; *United States* v. *Barr*, 4 Sawy. 255; *United States* v. *Hague*, 22 Fed. Rep. 706; *United States* v. *Van Vliet*, 23 Fed. Rep. 35; *Manley* v. *Olney*, 32 Fed. Rep. 709; *Birdseye* v. *Sheffer*, 37 Fed. Rep. 825; *Aspley* v. *Murphy*, 50 Fed. Rep. 377; *Postal Tel. Cable Co.* v. *Southern R. R. Co.*, 89 Fed. Rep. 194; *Fairchild* v. *United States*, 91 Fed. Rep. 298; *Strong* v. *United States*, 93 Fed. Rep. 258; *Emblen* v. *Lincoln Land Co.*, 94 Fed. Rep. 713; 102 Fed. Rep. 562; *United States* v. *Jacobus*, 96 Fed. Rep. 262; *United States* v. *Kelley*, 97 Fed. Rep. 461; *Cincinnati Brewing Co.* v. *Betteman*, 102 Fed. Rep. 17; *McClain* v. *Williams*, 10 S. Dak. 336; *Raush* v. *Mor-*